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ALEXANDER L. STEVAS

No. 80-1581

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

LOUIS MATTIS, et al.,

Petitioners,

vs.

JAMES G. WATT, Secretary of the Interior, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

A federal oil and gas lease was deemed terminated on July 31, 1978 due to Petitioners' failure to commence drilling activities, yet necessary drilling and use permits were denied by Respondents totally depriving Petitioners of the opportunity to commence said drilling activities. The questions presented are:

1. Have Petitioners' Fifth Amendment property rights been violated?

2. Did Respondents totally withdraw the public lands from all uses without authorization or Act of Congress and in violation of the Wilderness and Mineral Leasing Acts?

3. Did the District Court abuse its discretion in overturning the status quo and terminating the lease?

4. Did the Court of Appeals reach a decision herein inconsistent with Union v. Morton (9th Cir., 1975) 512 F.2d 743?

TOPICAL INDEX

	Page
Table of Authorities	ii
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	5
CONCLUSION	11
APPENDIX A	
APPENDIX B	
APPENDIX C	
APPENDIX D	

TABLE OF AUTHORITIES

Cases	Page
Mountain States Legal Foundation v. Andrus, (D.Ct. Wyo., 1980) 499 F.Supp. 383	6
Rocky Mountain Oil and Gas Association v. Andrus, (D.Ct. Wyo., 1980) 500 F.Supp. 1338	8
TVA v. Hill, (1978) 437 U.S. 153	5
Union v. Morton, (9th Cir. 1975) 512 F.2d 743	I, 4, 5, 10
Constitution	
United States Constitution, Fifth Amendment	I, 2, 5, 11
Regulations	
36 C.F.R. §251.1(b)	3
43 C.F.R. §3103.3-8(b)	3
50 C.F.R. §17.11	3
50 C.F.R. §17.95	3

Statutes

16 U.S.C. §§1131, et seq. 3

16 U.S.C. §§1531, et seq. 3

28 U.S.C. §1254(1) 2

30 U.S.C. §§181, et seq. 2

43 U.S.C. §§1701, et seq. 3, 6

Miscellaneous

Senate Report No. 1549,
1960 U.S. Cong. & Adm. News,
pp. 3314-15 3

No.

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LOUIS MATTIS, et al.,

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CECIL D. ANDRUS, Secretary
of the Interior, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners (plaintiffs-appellants below) respectfully pray that a writ of certiorari issue to review the Court of Appeals' order affirming the District Court's denial of a preliminary injunction.

OPINIONS BELOW

The Memorandum of the Ninth Circuit Court of Appeals which will not be published is reproduced

in Appendix A to this Petition.

The Order of the Court of Appeals denying Petitioners' motions to stay the District Court's ruling pending appeal and to expedite the appeal is also reproduced in Appendix A to this Petition.

The Order Denying Preliminary Injunctive Relief of the District Court which was not reported is reproduced in Appendix B to this Petition as is the order denying a stay and dissolving the temporary restraining order.

JURISDICTION

The judgment of the Court of Appeals was entered on December 17, 1980. The Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Reproduced in Appendix C are portions of:

1. The Fifth Amendment to the United States Constitution;

2. The Mineral Leasing Act of 1920, 30 U.S.C. §§181, et seq., the purpose of which is to promote the orderly development of oil and gas deposits in publicly owned lands of the

United States through private enterprise. The Act was amended in 1960 in response to the "potentially dangerous slackening in exploration for development of domestic reserves of oil and gas so necessary for our security in war and peace." (Senate Report No. 1549, 1960 U.S. Cong. & Adm. News, pp. 3314-15);

3. The Endangered Species Act of 1973, 16 U.S.C. §§1531, et seq., the purpose of which is to provide a program for the conservation of endangered species;

4. The Wilderness Act of 1964, 16 U.S.C. §§1131, et seq., which provides that the Mineral Leasing Act shall apply to mineral leasing notwithstanding any provisions of the Wilderness Act until December 31, 1983;

5. The Federal Land Policy and Management Act of 1976, 43 U.S.C. §§1701, et seq., which states that public lands are to be managed in a manner recognizing the nation's need for minerals, food, timber and fiber from public lands; and

6. Regulations cited as 36 C.F.R. §251.1(b) regarding special use permits and 43 C.F.R. §3103.3-8(b) regarding extension of lease terms.

50 C.F.R. §17.11 lists the California Condor (Gymnogyps Californianus) as an endangered species.

50 C.F.R. §17.95 designates the critical habitats of the California Condor which includes the lands encompassed by Lease R1137.

STATEMENT OF THE CASE

Petitioners are the owner and assignees of U.S. Oil and Gas Lease Serial No. R1137 ("Lease R1137") issued by the Department of Interior effective August 1, 1968 for an initial term of ten years. Petitioners paid annual rentals as required by the lease but were denied access to the leased lands by the Department of Agriculture and were refused a drilling permit by the Department of Interior. As a result, Petitioners were unable to commence drilling operations so that the automatic two year extension as provided by law was not granted. Denied also was Petitioners' request for a two year extension by means of a suspension of operations. The lease was deemed terminated as of July 31, 1978.

The lease lies within the Sespe Condor Sanctuary of Ventura County, California, but since directional drilling was to be used, an existing drill-site not within the Sanctuary was proposed. Approvals for the necessary permits were denied due to the alleged proximity of Condor nest sites pursuant to lease stipulations which are appended hereto.

Petitioners have relied upon Union v. Morton (9th Cir. 1975) 512 F.2d 743 for the proposition that unreasonable governmental regulation of property rights can amount to a taking in violation of the Due Process Clause of the Fifth Amendment. As further evidenced by a moratorium on the issuance of new leases beginning in early 1970, the Respondents undertook a policy of forbidding all mineral leasing activities on lands in and about

the Sespe Condor Sanctuary and treated the lands involved herein as a withdrawn wilderness area under the Wilderness Act of 1964 but without action of Congress as required by said Act.

Accordingly, prior to the initial termination date of Lease R1137, Petitioners brought suit in the Central District of California and obtained a temporary restraining order on July 27, 1978. A settlement was proposed by the Court but Respondents declined to accept same. On November 20, 1978 the District Court denied Petitioners' request for a preliminary motion so that the lease was deemed terminated on July 31, 1978.

An ex parte motion for Stay of Order was denied on November 21, 1978 and an appeal to the Ninth Circuit was filed on January 9, 1979. Oral argument took place on December 2, 1980 and the Court of Appeals' affirmance of the District Court's order was filed on December 17, 1980.

REASONS FOR GRANTING THE WRIT

1. In affirming the District Court below, the Ninth Circuit Court of Appeals has ruled contrary to its own holding in Union v. Morton (9th Cir. 1975) 512 F.2d 743 on an issue not yet ruled upon by this Court, to wit: Whether governmental interference with a federal oil and gas lease results in a prohibited Fifth Amendment "taking." While TVA v. Hill (1978) 437 U.S. 153, discussed similar environmental considerations

as involved herein, this Court has yet to render guidance on the interplay of conflicting expressions of congressional policy as found in the Mineral Leasing Act, the Endangered Species Act and the Wilderness Act. This issue is most timely and ripe for the Supreme Court's attention in view of Middle East turmoil, domestic oil shortages and the precariousness of the California Condor's continuing existence. This case presents an opportunity for this Court to stike a proper balance between environmental concerns and energy concerns.

2. The decisions below of the U.S. District Court for the Central District of California are also in conflict with two recent and now final decisions of the U.S. District Court of Wyoming, both brought to the attention of the Ninth Circuit subsequent to oral argument. The Wyoming cases involved: federal oil and gas leases and lands being considered for addition to the wilderness system; the interplay of agency policies with the Mineral Leasing and Wilderness Acts; as well as the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§1701, et seq. The Court stated in Mountain States Legal Foundation v. Andrus (D.Ct. Wyo., 1980) 499 F.Supp. 383:

> "The principal issue before the Court is whether or not the intent of Congress with respect to public lands has been threatened by an unauthorized de facto withdrawal from entry of these lands." (p. 386)
>
> * * *
>
> "Thus, the Forest Service's actions in regard to both RARE II areas in

question have been taken to preserve the wilderness characteristics of the RARE II inventory areas. . . .

". . . It cannot be seriously contended by the Defendants that RARE II Area No. 4-613 and RARE II Area No. 1-485 have not been virtually totally withdrawn from oil and gas leasing since at least the mid-1970's." (p. 390)

* * *

"To withhold vast tracts of land from oil and gas leasing for the purpose of wilderness preservation is, to withdraw and withhold the lands from the purposes and operation of the Mineral Leasing Act. If Congress had intended that result when it passed the sweeping Federal Land Policy and Management Act of 1976, which was the product of the Land Law Review Commission's extensive studies of the entire area of public land law, we feel Congress would have said so, and it didn't." (p. 392)

* * *

"There is thus little doubt as to Congress' desire to keep lands already designated as wilderness areas open to oil and gas leasing until at least December 31, 1983. . . .

". . . To allow the Secretary of Agriculture, in combination with the Secretary of Interior, to establish their own system of wilderness priorities through failure to act on oil and gas lease applications

within lands self-designated as meriting study for wilderness potential negates the system of wilderness designation established by Congress." (pp. 393-4)

* * *

"Subsequent acts defining the Forest Service's authority to manage national forest lands reiterate that surface management was not to interfere with mineral development on those lands." (p. 394)

* * *

"We conclude that it was the intent of Congress with the passage of FLPMA to limit the ability of the Scretary of Interior to remove large tracts of public land from the operation of the public land laws by generalized use of his discretion authorized under such laws." (p. 395)

In Rocky Mountain Oil and Gas Association v. Andrus (D.Ct. Wyo., 1980) 500 F.Supp. 1338, the court stated:

". . . the real issue in this case is the meaning of the clause '. . . subject, however, to the continuation of existing mining and grazing uses and mineral leasing in the manner and degree in which the same was being conducted on October 21, 1976. . . .'" (p. 1344)

". . . conflicts between policies such as development of minerals and environmental protection are bound to

occur. One policy should not suffer for the benefit of another. Compromises must be worked out. The solicitor's opinion leaves no room for compromise. Mineral development is completely and totally sacrificed for environmental concerns. Such a policy is statutorily erroneous and therefore is clearly contrary to expressed Congressional intent." (p. 1344)

* * *

"Pre-FLMPA leases have become 'shell' leases. Due to the non-impairment standard as defined by the Solicitor's opinion, Wilderness Handbook, and IMP's [Interim Management and Policy Guidelines for Wilderness Review], little or no exploration and drilling are permitted because of potential environmental impairment. With one hand the government refuses to permit drilling and exploration and at the same time extends the other hand to collect lease rentals. Such a position cannot be condoned by this court . . . regulations which regulate to the extent of destruction of an existing right are arbitrary, capricious and clearly against Congressional intent. A lease without developmental rights is a mockery of the term 'lease.'" (p. 1345)

* * *

"Such a system of issuing 'shell' leases with no developmental rights is clearly an unconstitutional taking and is blatantly unfair to lessees." (p. 1345)

This Court can redress the wrong done to the Petitioners by the Departments of Interior and Agriculture in unconstitutionally "taking" Lease R1137 by treating it as a de facto part of a wilderness area without congressional action. In failing to recognize the illegality of this action the district court, below, abused its discretion in denying the requested injunctive relief.

3. This Court has the opportunity to redress a very real wrong suffered by the Petitioners and not properly addressed by the courts below as a result of the defendant-federal agencies' tampering with terms of Lease R1137 so as to render impracticable the once-performable lease terms. This was done by ignoring the written lease stipulation forbidding drilling activity within one-half miles of a known Condor nest-site and denying drilling and use permits on the ground that the proposed well pad was within one and one-half miles of a known nest-site. In not recognizing this improper decision of the Forest Service, the District Court made a mistake of fact and law and clearly abused its discretion in terminating the temporary restraining order.

4. Through the temporary restraining order the District Court maintained the status quo by continuing Lease R1137 in existence for nearly four months past the termination date of its initial term. Yet, even though the further continuance of the status quo by means of a preliminary injunction would cause no prejudice to the defendants and would have no effect upon the Condor population, the District Court denied the injunctive request stating, inconsistently with Union v. Morton, supra,

that the plaintiffs were not likely to succeed on the merits.

5. Petitioners have been denied the benefit of their bargain, to wit: the exclusive right to develop the oil reserves under Lease R1137.

6. Petitioners have also lost the benefit sought from thousands of hours and dollars expended in developing the oil field, of which Lease R1137 is only a part, and nearly $10,000 of rentals paid to the government for Lease R1137. As it now stands the government has been unjustly enriched at the Petitioners' expense.

CONCLUSION

The present case is illustrative of an unbending application of federal agency policies originating from a narrow focus on environmental concerns to the point of ignoring the stated congressional policy of encouraging domestic oil development through private enterprise. Defendants herein have utterly failed to balance the countervailing policies and competing interests which is required of them as administrators of congressional action. Instead, they have raised up an impenetrable wall of restrictions making compliance with the terms of Lease R1137 impossible and thereby destroying said lease and taking a vested property interest of the Petitioners in violation of the Fifth Amendment.

For these reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

RICHARD R. CLEMENTS
CHRISTOPHER J. ANDERSON

Attorneys for Petitioners

APPENDIX A

United States Court of Appeals, Ninth Circuit.

Louis Mattis; Stephen Rowe; Cecil O. Basenberg; E. Baden Powell; Harry L. Browne; and Phoenix West Oil Corporation, a corporation, App ellants v. The Honorable Cecil D. Andrus, H. William Menard, Jr., Fred Schambeck, Harryette Sosbee, The Honorable Robert Bergland, John R. McGuire, Zane Smith, Walt Schloer, and Allan J. West, Appellees.

Argued and submitted - December 2, 1980

Decided - December 17, 1980

Appeal from the United States District Court for the Central District of California

Robert M. Takasugi, District Judge, Presiding

Before: Goodwin and Poole, Circuit Judges, and Price, District Judge.

The Plaintiffs, owners of an oil and gas lease on governmental land, appeal an order of the district court denying a preliminary injunction.

Plaintiffs have failed to show that the district court abused its discretion in denying the preliminary injunction. Accordingly, the challenged order is affirmed. The cause is remanded to the district court for such further proceedings, if any, as may be necessary to terminate the litigation. The defendants-appellees are entitled to costs.

Affirmed.

ORDER

United States Court of Appeals, for the Ninth Circuit.

Louis Mattis; Stephen Rowe; Cecil O. Basenberg; E. Baden Powell; Harry L. Browne; and Phoenix West Oil Corporation, a corporation, Plaintiffs/Appellants v. The Honorable Cecil D. Andrus, H. William Menard, Jr., Fred Schambeck, Harryette Sosbee, The Honorable Robert Bergland, John R. McGuire, Zane Smith, Walt Schloer, and Allan J. West, Defendants/Appellees.

Filed: September 27, 1979

Before: TRASK and HUG, Circuit Judges.

Upon due consideration, the court issues the following order:

(a) appellant's motion for stay pending appeal is denied; and

(b) appellant's motion to expedite appeal is denied.

APPENDIX B

ORDER

United States District Court, Central District of California.

Louis Mattis; Stephen Rowe; Cecil O. Basenberg; E. Baden Powell; Harry L. Browne; and Phoenix West Oil Corporation, a corporation, Plaintiffs v. The Honorable Cecil D. Andrus, H. William Menard, Jr., Fred Schambeck, Harryette Sosbee, The Honorable Robert Bergland, John R. McGuire, Zane Smith, Walt Schloer, and Allan J. West, Defendants. CV No. 78-2888-RMT.

Filed: December 13, 1979.

This court having read the plaintiff's Ex Parte Motion For Stay of Order, the attached Memorandum of Points and Authorities, the verified Complaint and the affidavits on file herein:

IT IS HEREBY ORDERED that the plaintiffs are denied their application for a stay of the Order entered on December 4, 1978, denying plaintiff's Motion for a Preliminary Injunction.

IT IS FURTHER ORDERED that the temporary restraining order, ordered through stipulation of the parties in this matter on July 17, 1978 by this court, is hereby terminated.

Dated: December 13, 1978

ROBERT M. TAKASUGI
United States District Judge

ORDER DENYING PRELIMINARY INJUNCTIVE RELIEF

United States District Court, Central District of California.

Louis Mattis; Stephen Rowe, Cecil O. Basenberg; E. Baden Powell; Harry L. Browne; and Phoenix West Oil Corporation, a corporation; Plaintiffs v. The Honorable Cecil D. Andrus, H. William Menard, Jr., Fred Schambeck, Harryette Sosbee, The Honorable Robert Bergland, John R. McGuire, Zane Smith, Walt Schloer, and Allan J. West, Defendants. CV No. 78-2888-RMT(Px).

Filed: December 1, 1978.

This matter came on for a hearing on plaintiffs' Motion for Preliminary Injunction on Monday, November 20, 1978, before the Honorable Robert M. Takasugi, United States District Judge, the plaintiffs appearing through their attorney, George L. Catlin of Reinjohn, Catlin & Clements, and defendants appearing through their attorneys, Andrea Sheridan Ordin, United States Attorney, Frederick M. Brosio, Jr., Assistant United States Attorney, Chief, Civil Division by Stephen E. O'Neil, Assistant United States Attorney, and after due consideration of the pleadings, legal memoranda, the affidavits in support of those memoranda, and the oral argument at the time of the hearing, and in accordance with the Findings of Fact and Conclusions of Law entered herein,

IT IS ORDERED, ADJUDGED AND DECREED that the preliminary injunctive relief sought by plaintiffs is denied, and that plaintiffs motion for such relief is hereby denied forthwith.

DATED: December 1, 1978.

UNITED STATES DISTRICT JUDGE

APPENDIX C

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

CONSTITUTIONAL PROVISIONS

Amendment V. "No person shall be *** deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATUTES

The Mineral Leasing Act of 1920, 30 U.S.C. §§181, et seq.:

§226(e) "Competitive leases issued under this section shall be for a primary term of five years and noncompetitive leases for a primary term of ten years. Each such lease shall continue so long after its primary term as oil or gas is produced in paying quantities. Any lease issued under this section for land on which, or for which under an approved cooperative or unit plan of development or operation, actual drilling operations were commenced prior to the end of its primary term and are being diligently prosecuted at that time shall be extended for two years and so long thereafter as oil and gas is produced in paying quanitites."

§226(f) "No lease issued under this section which is subject to termination because of cessation of production shall be terminated for this cause so long as reworking or drilling operations which were commenced on the land prior to or within sixty days after cessation of production are conducted thereon with reasonable diligence, or so long as oil or gas is produced in paying quantities as a result of such operations. No lease issued under this section shall expire because operations or production is suspended under any order, or with the consent, of the Secretary. No lease issued under this section covering lands on which there is a well capable of producing oil or gas in paying quantities shall expire because the lessee fails to produce the same unless the lessee is allowed a reasonable time, which shall be not less than sixty days after notice by registered or certified mail, within which to place such well in producing status or unless, after such status is established, production is discontinued on the leased premises without permission granted by the Secretary under the provisions of this chapter."

The Endangered Species Act of 1973, 16 U.S.C. §§1531, et seq.:

§1531(b) "The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be

conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section."

§1532(3) "The terms 'conserve,' 'conserving,' and 'conservation' mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking."

The Wilderness Act of 1964, 16 U.S.C. §§1131, et seq.:

§1131(a) "In order to assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas within the United States and its possessions, leaving no lands designated for preservation

and protection in their natural condition, it is hereby declared to be the policy of the Congress to secure for the American people of present and future generations the benefits of an enduring resource of wilderness. For this purpose there is hereby established a National Wilderness Preservation System to be composed of federally owned areas designated by Congress as 'wilderness areas,' and these shall be administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness, and so as to provide for the protection of these areas, the preservation of their wilderness character, and for the gathering and dissemination of information regarding their use and enjoyment as wilderness; and no Federal lands shall be designated as 'wilderness areas' except as provided for in this chapter or by a subsequent Act."

§1132(b) ". . . each recommendation of the President for designation as 'wilderness' shall become effective only if so provided by an Act of Congress."

§1132(c) "Within ten years after September 3, 1964 the Secretary of the Interior shall review every roadless area of five thousand contiguous acres or more in the national parks, monuments and other units of the national park system and every such area of, and every roadless island within, the

national wildlife refuges and game ranges, under his jurisdiction on September 3, 1964 and shall report to the President his recommendation as to the suitability or nonsuitability of each such area or island for preservation as wilderness. The President shall advise the President of the Senate and the Speaker of the House of Representatives of his recommendation with respect to the designation as wilderness of each such area or island on which review has been completed, together with a map thereof and a definition of its boundaries. Such advice shall be given with respect to not less than one-third of the areas and islands to be reviewed under this subsection within three years after September 3, 1964, not less than two-thirds within seven years of September 3, 1964, and the remainder within ten years of September 3, 1964. A recommendation of the President for designation as wilderness shall become effective only if so provided by an Act of Congress. Nothing contained herein shall, by implication or otherwise, be construed to lessen the present statutory authority of the Secretary of the Interior with respect to the maintenance of roadless areas within units of the national park system."

§1132(e) "Any modification or adjustment of boundaries of any wilderness area shall be recommended by the appropriate Secretary after public notice of such proposal and public hearing or hearings as provided in

subsection (d) of this section. The proposed modification or adjustment shall then be recommended with map and description thereof to the President. The President shall advise the United States Senate and the House of Representatives of his recommendations with respect to such modification or adjustment and such recommendations shall become effective only in the same manner as provided for in subsections (b) and (c) of this section."

§1133(d)(2) "Nothing in this chapter shall prevent within national forest wilderness areas any activity, including prospecting, for the purpose of gathering information about mineral or other resources, if such activity is carried on in a manner compatible with the preservation of the wilderness environment. Furthermore, in accordance with such program as the Secretary of the Interior shall develop and conduct in consultation with the Secretary of Agriculture, such areas shall be surveyed on a planned, recurring basis consistent with the concept of wilderness preservation by the Geological Survey and the Bureau of Mines to determine the mineral values, if any, that may be present; and the results of such surveys shall be made available to the public and submitted to the President and Congress."

§1133(d)(3) "Notwithstanding any other provisions of this chapter, until midnight December 31, 1983, the United States mining laws and all laws pertaining to mineral leasing shall, to the same extent as applicable prior to September 3, 1964, extend to those national forest lands designated by this chapter as 'wilderness areas'; subject, however, to such reasonable regulations governing ingress and egress as may be prescribed by the Secretary of Agriculture consistent with the use of the land for mineral location and development and exploration, drilling and production. . . ."

§1134(b) "In any case where valid mining claims or other valid occupancies are wholly within a designated national forest wilderness area, the Secretary of Agriculture shall, by reasonable regulations consistent with the preservation of the area as wilderness, permit ingress and egress to such surrounded areas by means which have been or are being customarily enjoyed with respect to other such areas similarly situated."

The Federal Land Policy and Management Act of 1976, 43 U.S.C. §§1701, et seq.:

§1701(a) "The Congress declares that it is the policy of the United States that -

* * *

(b) in adminstering public land statutes and exercising discretionary

authority granted by them, the Secretary be required to establish comprehensive rules and regulations after considering the views of the general public; and to structure adjudication procedures to assure adequate third party participation, objective administrative review of initial decisions, and expeditious decision-making;

(6) judicial review of public land adjudication decisions be provided by law;

(7) goals and objectives be established by law as guidelines for public land use planning, and that management be on the basis of multiple use and sustained yield unless otherwise specified by law;

* * *

(12) the public lands be managed in a manner which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands including implementation of section 21a of Title 30 as it pertains to the public lands; and. . . ."

§1701(b) "The policies of this Act shall become effective only as specific statutory authority for their implementation is created by this Act or by subsequent legislation and shall then be construed as supplemental to and not in derogation of the purposes for which public lands are administered under other provisions of law."

§1782(b) "The President shall advise the President of the Senate and the Speaker of the House of Representatives of his recommendations with respect to designation as wilderness of each such area, together with a map thereof and a definition of its boundaries. Such advice by the President shall be given within two years of the receipt of each report from the Secretary. A recommendation of the President for designation as wilderness shall become effective only if so provided by an Act of Congress."

§1782(c) "During the period of review of such areas and until Congress has determined otherwise, the Secretary shall continue to manage such lands according to his authority under this Act and other applicable law in a manner so as not to impair the suitability of such areas for preservation as wilderness, subject, however, to the continuation of existing mining and grazing uses and mineral leasing in the manner and degree in which the same was being conducted on October 21, 1976. . . ."

REGULATIONS

36 C.F.R. §251.1(b)

"(2) Special use permits shall be issued by the Chief of the Forest Service . . . and shall be in such form and contain such terms, stipulations, conditions and agreements as may be required by the regulations

of the Secretary of Agriculture and the instructions of the Chief of the Forest Service."

43 C.F.R. §3103.3-8(b):

"The term of any lease will be extended by adding thereto any period of suspension of all operations and production during such term pursuant to any direction or assent of the Secretary."

APPENDIX D

LEASE R1137 "CONDOR" STIPULATIONS

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

PROTECTIVE CONDOR STIPULATIONS FOR LANDS UNDER JURISDICTION OF THE FOREST SERVICE OF THE DEPARTMENT OF AGRICULTURE

T. 5 North, R. 19 West, SBM
sec. 13, all;
sec. 14, all;
sec. 23, N 1/2;
sec. 24, W 1/2 NE 1/4, NW 1/4, N 1/2 SW 1/4, all unsurveyed.

The lessee is not authorized to commence operations on the lease area shown above until the Forest Service has approved a plan setting forth the conditions of surface occupancy and use reasonably necessary to protect the Condors on the area. Failure of the lessee to comply with such a plan shall be a breach of the conditions of this lease.

The lessee will not on any land which the lessee has the right under this lease to use the surface, erect or install any rig for the drilling of any well nor construct any road, erect any structure or conduct any activity within one-half mile of any Condor nest, and will not carry on blasting

within one mile of obstructed distance or two miles of unobstructed distance from such nesting site, unless a permit be obtained from the Forest Service to conduct such activity. The location of the Condor nests shall be subject to determination by the Forest Service and shall not be subject to question or appeal by the lessee, sub-lessee, or assignee.

In accepting this lease, the lessee agrees to pledge and obtain pledges from all persons admitted to the area by the lessee, or who may enter it on his behalf, not to molest, shoot at, or in any way injure or do anything likely to cause any injury to any Condors, and not to approach within one-half mile of any Condor nest, nor to disclose the location of any such nest.

The determination of the Secretary of the Interior shall be final with respect to any disputed question, either of fact or of extent of right, use, or privilege, which may arise with respect to the provisions of these stipulations.

/s/ LOUIS MATTIS
Lessee

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

STIPULATION FOR LANDS UNDER JURISDICTION OF DEPARTMENT OF AGRICULTURE WITHIN CONDOR SANCTUARY ESTABLISHED BY P.L.O. 695, January 16, 1951

T.5 North, R. 19 West, SBM
sec. 13, S 1/2;
sec. 14, all;
sec. 23, N 1/2;
sec. 24, W 1/2 NE 1/4, NW 1/4,
N 1/2 SW 1/4, all unsurveyed.

As provided in Public Land Order No. 695 of January 16, 1951, no lessee shall use or invade the surface of the area shown above for any purpose. The lessee is, however, authorized to employ directional drilling to exploit the mineral resources under this area provided that such drilling will not disturb the surface of the area or otherwise interfere with the use being made of it by the Forest Service. It is understood and agreed that the use of this area for national forest purposes is superior to any other use.

/s/ Louis Mattis
Lessee

Office-Supreme Court, U.S.
FILED
APR 21 1981
ALEXANDER L. STEVAS

No. 80-1581

In the Supreme Court of the United States

OCTOBER TERM, 1980

LOUIS MATTIS, ET AL., PETITIONERS

v.

JAMES G. WATT, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether respondents acted unlawfully in refusing to grant petitioners permission to conduct certain operations under a federal mineral lease when those operations threatened the continued existence of an endangered wildlife species.

TABLE OF CONTENTS

Page

Opinion below 1

Jurisdiction 1

Statement 2

Argument 4

Conclusion 8

TABLE OF AUTHORITIES

Cases:

Andrus v. *Allard*, 444 U.S. 51 6

Agins v. *City of Tiburon*, 447 U.S. 255 6

Federal Housing Administration v. *The Darlington, Inc.*, 358 U.S. 84 6

Mountain States Legal Foundation v. *Andrus*, 499 F. Supp. 383 7

Penn Central Transportation Co. v. *New York City*, 438 U.S. 104 6

Rocky Mountain Oil and Gas Association v. *Andrus*, 500 F. Supp. 338, appeal pending, No. 80-1040 (10th Cir.) 7

Tennessee Valley Authority v. *Hill*, 437 U.S. 153 ..... 4, 5

Union Oil Co. v. *Morton*, 512 F. 2d 743 6

Wisniewski v. *United States*, 353 U.S. 901 6

Constitution and statutes:

United States Constitution, Fifth Amendment 5

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Page

Constitution and statutes—(Continued):

Endangered Species Conservation Act of 1966, Pub. L. No. 89-699, 80 Stat. 926, repealed by Pub. L. No. 93-205, Section 14, 87 Stat. 903 ..... 2, 5
Section 1(b), 80 Stat. 926 5

Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884, 16 U.S.C. 1531 *et seq.* 2
Section 7, 16 U.S.C. 1536 ..... 3, 4

Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3751 *et seq.* 3
16 U.S.C. (Supp. III) 1536(a)(2) 3
16 U.S.C. (Supp. III) 1536(e)-(p) 4

Federal Land Policy and Management Act of 1976, 43 U.S.C. 1701 *et seq.* 7
Section 701(f), 43 U.S.C. 1701(f) note ... 7-8

Mineral Lands Leasing Act of 1920, 30 U.S.C. 181 *et seq.* 2
30 U.S.C. 209 2
30 U.S.C. 226(e) 2

Wilderness Act of 1964, 16 U.S.C. 1131 *et seq.* ... 7

Pub. L. No. 96-159, 93 Stat. 1226 3

Miscellaneous:

32 Fed. Reg. 40001 (1967) 2, 6

40 Fed. Reg. 44420 (1975) 2

41 Fed. Reg. 41916 (1976) 2

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1581

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OPINION BELOW

The memorandum opinion of the court of appeals (Pet. App. A-1) and the order (*id.* at B-2 to B-3) and findings of fact and conclusions of law (R. 105-108)[1] of the district court are not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 17, 1980. The petition for a writ of certiorari was filed on March 12, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] "R." refers to the Excerpts of the Clerk's Record filed in the court of appeals.

STATEMENT

Petitioners are the owners and assignees of an oil and gas lease granted by the Secretary of the Interior under the Mineral Lands Leasing Act of 1920, 30 U.S.C. 181 *et seq.* The lease became effective August 1, 1968 (R. 106). Under the Mineral Lands Leasing Act, it was to expire after ten years, but if at the end of that period "actual drilling operations were commenced * * * and [were] being diligently prosecuted," the lease would be automatically extended for two additional years. 30 U.S.C. 226(e). In June and July of 1978, petitioners applied to various federal agencies—respondents in this case—for permission to deepen a well located near the lease site;[2] to improve a road providing access to that well; and to drill a well on the lease site. In each case, permission was denied (R. 105-106).[3] Because of those denials, petitioners were unable to begin drilling, and their lease expired at the end of the ten-year period.

The principal reason for denying the applications was that petitioners' proposed activities would threaten the continued existence of the California condor (R. 393). The California condor had been listed as an endangered species under the Endangered Species Conservation Act of 1966, Pub. L. No. 89-669, 80 Stat. 926, repealed by Pub. L. No. 93-205, Section 14, 87 Stat. 903, and under the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.* See 32 Fed. Reg. 4001 (1967); 40 Fed. Reg. 44420 (1975). Its critical habitat had also been designated. 41 Fed. Reg. 41916 (1976). Petitioners do not challenge the listing or designation.

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[2]Petitioners proposed to drill from that well to beneath the surface of the lease site (see Pet. App. D-3; R. 106).

[3]Petitioners also applied for a suspension of operations under the lease (R. 105). The Secretary of the Interior has the power to order such a suspension "in the interest of conservation." 30 U.S.C. 209. The lease is then extended for the period of the suspension. This application was also denied.

Section 7 of the Endangered Species Act of 1973 required all federal agencies "to insure that actions authorized * * * by them do not jeopardize the continued existence of * * * endangered species * * * or result in the destruction or modification of [a critical] habitat." 16 U.S.C. 1536 (current version at 16 U.S.C. (Supp. III) 1536(a)(2)).[4] The Fish and Wildlife Service of the Department of the Interior reported that, because of the noise and activity that would accompany the drilling proposed by petitioner, the drilling would be "likely to jeopardize the continued existence of the California condor and adversely modify its Critical Habitat" (Report of Secretary of Interior's Decision on Plaintiff's Applications for Suspension of Operations and Drilling Permit (filed in the district court September 19, 1979) at 10-12). Other biologists, emphasizing the proximity of petitioners' proposed operations to condor nests, reached the same conclusion (see *e.g., id.* at 28). On the basis of these reports, respondents denied petitioners' applications (see *id.* at 4-5).

2. Petitioners brought this action on July 26, 1978, in the United States District Court for the Central District of California. They asserted that the denials of permission were arbitrary and capricious, abuses of discretion, and unconstitutional (R. 105). They requested, among other things, an injunction requiring that their lease be extended and that they be granted the permission they sought. The district court denied a preliminary injunction (Pet. App. B-2 to B-3). It found that petitioners had failed to show that their proposed activities would not be detrimental to the

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[4]The Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3752, and Pub. L. No. 96-159, 93 Stat. 1226, amended Section 7, 16 U.S.C. 1536, but both were enacted after respondents' decisions in this case, and neither alters the substance of the passage quoted in text. Petitioners do not contend that these amendments affect the present case.

condor (R. 106-107). It held that respondents' decisions "were not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" (R. 108). The court of appeals summarily affirmed (Pet. App. A-1).

ARGUMENT

1. Petitioners appear to contend (Pet. 6, 10, 11) that respondents' decisions were arbitrary and capricious and an abuse of discretion. But respondents' decisions—based on the determination that granting petitioners' applications would be inconsistent with the Endangered Species Act—were supported by the record and were properly upheld by the district court and the court of appeals.

Petitioners offer no ground for questioning the factual basis of the administrative decisions they challenge. Their sole argument (Pet. 11) is that respondents have "failed to balance the * * * competing interests" in a proper way. In view of this Court's holding in *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153 (1978), that Section 7 of the Endangered Species Act of 1973 "admits of no exception" (*id.* at 173),[5] that "Congress intended endangered species to be afforded the highest of priorities" (*id.* at 174), and that Congress intended to subordinate agencies " 'primary missions' " to the preservation of endangered species (*id.* at 185), respondents scarcely can be accused of overemphasizing the protection of the California condor. In any event, the question of how properly to balance competing interests

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[5]Amendments to the Endangered Species Act, see note 4, *supra*, have provided for certain exceptions (see, *e.g.*, 16 U.S.C. (Supp. III) 1536(e)-(p)), but petitioners do not suggest that these amendments are relevant here.

is to be resolved in the first instance by the agencies administering the programs involved,[6] subject to the review of the district court and the court of appeals. That issue, which depends on the facts of this particular case, does not warrant review by this Court.[7]

2. Petitioners also contend (Pet. 5, 11) that respondents' actions amounted to a taking of property without just compensation in violation of the Fifth Amendment. This claim is without merit. The property interest petitioners acquired was specifically limited by the requirement that petitioners protect the condor and its habitat; the lease itself contained stipulations to that effect (see Pet. App. D-1 to D-2) and the Endangered Species Conservation Act of 1966 was in force when petitioners entered into the lease.[8] The condor had

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[6]This is particularly true here. Petitioners' lease provided (Pet. App. D-2):

> The determination of the Secretary of the Interior shall be final with respect to any disputed question, either of fact or of extent of right, use, or privilege, which may arise with respect to the provisions of these stipulations.

[7]Petitioners also assert that respondents violated the explicit terms of the lease by forbidding drilling that was not within one-half mile of a known condor nest (Pet. 10). The lease absolutely prohibited activity within one-half mile of a nest (Pet. App. D-1) but did not purport to authorize all other activity. Indeed, the lease explicitly required petitioners to adhere to federally imposed conditions "reasonably necessary to protect the Condors on the area" (*ibid.*). And petitioners identify nothing in the lease suggesting that their operations were exempt from the Endangered Species Act.

[8]The Endangered Species Conservation Act of 1966 was repealed by Section 14 of the Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 903. The obligations imposed on federal agencies by the 1966 Act were not so strict as those imposed by the Endangered Species Act of 1973 (see *Tennessee Valley Authority* v. *Hill*, *supra*, 437 U.S. at 175-186). Section 1(b) of the 1966 Act required federal agencies to protect endangered species "insofar as is practicable and consistent with the[ir] primary purposes," and to preserve such species' habitats "on lands under their jurisdiction" (80 Stat. 926). But there is no reason to doubt that these provisions would have authorized the actions taken

already been listed as an endangered species when the lease was signed (32 Fed. Reg. 4001 (1967)).

Moreover, petitioners have not demonstrated that respondents' actions effectively prevented them from taking advantage of their lease by exploring for oil and gas. Petitioners waited until more than nine years and ten months of the ten-year term of their lease had elapsed before they proposed a method of exploration. The permission they needed to pursue that method was precluded by the Endangered Species Act, and because petitioners had waited so long their lease expired before they could propose a different method. Petitioners have failed to establish that there were no other ways in which they might have searched for oil and gas while still meeting respondents' requirements for protecting the condor. For this reason, petitioners have wholly failed to substantiate their claim that there was a taking.[9] See *Agins* v. *City of Tiburon*, 447 U.S. 255, 262-263 (1980); *Andrus* v. *Allard*, 444 U.S. 51, 64-68 (1979). All that petitioners have shown is that a regulatory program, which existed at the time their lease was granted and to which their lease itself alluded, affected their operations under the lease. Such regulation does not constitute a taking. See *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124-125 (1978).[10]

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by respondents here. In any event, petitioners had no protected expectation that the existing program would not be "buttressed by subsequent amendments to achieve the legislative end." *Federal Housing Administration* v. *The Darlington, Inc.*, 358 U.S. 84, 91 (1958).

[9]Petitioners do not contend that they were denied an opportunity to show the extent to which the Endangered Species Act interfered with their leasehold interest.

[10]Petitioners rely on *Union Oil Co.* v. *Morton*, 512 F. 2d 743 (9th Cir. 1975), in support of their claim. That case involved a possible indefinite suspension of all activities on a mineral lease (*id.* at 750-751), not the limited denial of permission at issue here. Moreover, this Court does not ordinarily grant certiorari to resolve asserted conflicts between

3. Finally, petitioners contend (Pet. 5) that respondents "treated the lands involved herein as a withdrawn wilderness area under the Wilderness Act of 1964," 16 U.S.C. 1131 *et seq.* Petitioners contend that such an action violates the Wilderness Act and the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1701 *et seq.* They also claim that the decision below conflicts with two decisions of the United States District Court for the District of Wyoming, *Rocky Mountain Oil and Gas Association* v. *Andrus*, 500 F. Supp. 1338 (D. Wyo. 1980), appeal pending, No. 80-1040 (10th Cir.), and *Mountain States Legal Foundation* v. *Andrus*, 499 F. Supp. 383 (D. Wyo. 1980).

These contentions are also without foundation. As we have noted, petitioners have not shown that respondents effectively barred all exploitation of the land. Respondents merely denied petitioners' applications for permission to conduct certain operations. Thus in no sense can respondents' action be described as "withdrawing" any land. It is true that one respondent agency asserted, as a secondary ground for denying one of the petitioners' applications, the possibility that the area involved might be included in the National Wilderness Preservation System (Complaint Exhibit H). But, as the district court found (R. 106), "the primary basis" for respondents' actions was the Endangered Species Act. And, as both courts below correctly held, the Endangered Species Act alone is a sufficient ground to sustain respondents' decisions. Accordingly, the Wilderness Act is not relevant to this case.

The Federal Land Policy and Management Act likewise has no bearing on this case. Section 701(f) of the Act expressly disclaims any intention to repeal by implication

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decisions of the same circuit. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

any other statute. 43 U.S.C. 1701(f) note. Therefore, actions required by the Endangered Species Act cannot be prohibited by the FLPMA.[11]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[11]The district court decisions cited by petitioners (Pet. 6-9) deal only with the FLPMA and the Wilderness Act. They do not involve the Endangered Species Act. Accordingly, they have no bearing on the issues involved in this case.

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